STATE OF MICHIGAN

COURT OF APPEALS

SHERRILL NORRIS and BENJAMIN NORRIS, Plaintiffs-Appellants, v WATERFORD BIG BOY, INC., Defendant-Appellee.	UNPUBLISHED February 17, 2005 No. 250020 Oakland Circuit Court LC No. 2002-044548-NO

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

In this premises liability action, plaintiffs appeal as of right an order granting summary disposition in favor of defendant, pursuant to MCR 2.116(C)(10). We affirm.

Plaintiffs went to defendant's restaurant at least once a week for many years. On one visit, Sherrill Norris stepped into a pothole in defendant's parking lot and injured her leg. It was dark at the time, and that area of the parking lot was dimly lit. Plaintiffs' complaint alleged that defendant maintained a business open to the public in an unreasonably dangerous condition and failed to warn of the dangerous and unsafe condition. In her deposition testimony, Sherrill Norris stated that she could have seen the pothole before she fell into it if she had been looking at it. She also acknowledged that she had previously noticed that there were potholes in that area of the parking lot.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that the condition was open and obvious. The trial court granted defendant's motion for summary disposition, finding that the condition was open and obvious and noting that the darkness and poor illumination did not alter the analysis.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition in favor of defendant pursuant to the open and obvious doctrine. Specifically, plaintiffs argue that the pothole was not open and obvious because it could not have been discovered upon casual inspection. In the alternative, they argue that special aspects of the pothole rendered it an unreasonable hazard despite its obviousness. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557; 664 NW2d 151 (2003). A motion for summary disposition brought under MCR 2.116(C)(10) is properly granted when the trial court considers affidavits, pleadings,

depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the non-moving party and determines that no genuine issue of material fact exists. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Payne v Farm Bureau Ins*, 263 Mich App 521, 525; 688 NW2d 327 (2004).

A premises owner owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). The duty generally does not encompass warning about or removing open and obvious dangers unless the premises owner should anticipate that special aspects of the condition render it harmful despite the invitee's knowledge of it. *Id.* Whether a hazardous condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered the danger and risk presented upon casual inspection. *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, if special aspects of a condition make an open and obvious risk unreasonably dangerous, the premises owner has a duty to take reasonable precautions to protect invitees from that risk. *Lugo, supra* at 517. If the open and obvious condition has no such special aspects, the condition is not unreasonably dangerous. *Id.* at 517-519.

In *Lugo*, the Supreme Court considered the issue of liability for injury due to ordinary potholes in parking lots, stating that "potholes in pavement are an 'everyday occurrence' that ordinarily should be observed by a reasonably prudent person." *Lugo, supra* at 523. When considering such "everyday occurrences," the overriding public policy of encouraging people to take care for their own safety precludes imposing a duty on the possessor of land to make these ordinary occurrences "foolproof." *Id.*, citing *Bertrand v Alan Ford, Inc*, 449 Mich 606, 616-617; 537 NW2d 185 (1995).

Here, Sherrill Norris had prior knowledge that the parking lot had potholes. She also admitted that she could have seen the pothole had she been looking at it before she stepped in it. An ordinary person of average intelligence would have been watching the area of the dim parking lot where she was walking, would have seen the pothole, and would not have stepped in it. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 497; 595 NW2d 152 (1999). Further, the condition, even at night, was an ordinary pothole. It cannot be expected that a typical person tripping on an ordinary pothole would suffer severe injury. *Lugo, supra* at 520-522. Plaintiffs did not show that the pothole had any characteristics of an unreasonable risk that could be considered a special aspect. *Id.* at 523. The trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens